IN THE

Supreme Court of the United States

OCTOBER TERM 1922

No. 334

ARTHUR W. IDE, CHARLES GRANT CALDWELL, H. B. LOOMIS, et al.,
Appellants.

vs.

THE UNITED STATES OF AMERICA.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit

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Brief on Behalf of Appellants

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I.

Statement of the Case.

This is a suit involving a controversy over the respective rights of the parties to the use for irrigation purposes of the waters of Bitter Creek, a tributary of the Shoshone River in the State of Wyoming, and also a controversy as to whether the United States, in carrying out the work of the Shoshone Reclamation Project, has a right of way across the lands of some of appellants for the excavations which are shown to have been made.

Bitter Creek drains what are known as the Garland Flats, a valley included within the Shoshone Reclamation Project.

Appellant Ide owns a homestead consisting of Lot 41 in Township 56, Range 98, through which Bitter Creek flows, and which is irrigated with water from the reclamation project. So far as this appellant is concerned the only question involved is with respect to the injuries to his land caused by the excavations made by the appellee in the process of deepening Bitter Creek where it flows across his land.

The other appellants, Charles Grant Caldwell, Agnes H. Caldwell, Christopher Althoff, Arthur R. Thornburg, Earl Kysar and D. E. Townsley, are owners of separate portions of Section 36, or Lot 37, in Township 56, Range 99, which is hereinafter referred to as the school section, and through the southern half of which Bitter Creek also flows. This section was purchased by these appellants from the State of Wyoming. Eighty acres of it, belonging to appellant Charles Grant Caldwell, is, and since 1910 has been, irrigated with water taken by him from Bitter Creek through Caldwell ditches No. 1 and No. 2, by virtue of appropriation permits granted to him by the State of Wyoming, dated October 6, 1910. Approximately all of the remainder of this section is irrigated with water taken by the owners from the same source through enlargements of the above mentioned ditches by virtue of permits granted by the State of Wyoming, dated April 22, 1915. Appellant Charles Grant Caldwell also owns a homestead of 80 acres, being the East half of the Southeast quarter (E½ SE¼) of Lot 38, Township 56, Range 99, adjoining the school section on the west, through which Bitter Creek flows, and which is irrigated with water from the reclamation project.

During the fall of 1915 the United States, represented by officers of the Shoshone Reclamation

Project, excavated and deepened the natural channel of Bitter Creek to such an extent that the diversion dams and headgates, constructed and maintained by the appellants who own the school section for the purpose of diverting water for its irrigation, were destroyed or rendered useless, and appellants were thereby prevented from taking any water from the stream to supply their appropriations, and they will be so prevented in the future so long as the conditions created by the reclamation officers are permitted to continue.

In the process of the excavation and deepening above referred to, large quantities of the waste material were piled upon the lands of appellants Ide, Charles Grant Caldwell, Agnes H. Caldwell, Thornburg and Althoff, destroying such lands for agricultural purposes, and materially injuring and depreciating the value of the remainder of such lands.

The United States brought this suit seeking to restrain appellants from interfering with the above described acts of the reclamation officers, and appellants interposed counter claims, praying that plaintiff be enjoined from making such excavations and from interfering with appellants' water rights. It was stipulated that in the event of a decision on final hearing in favor of defendants, plaintiff should reimburse defendants for the injury to their lands, resulting from the excavation, and should also reimburse defendants for the depreciation in the value of their lands resulting from the destruction of their irrigation works and a deprivation of their water rights, or should, in lieu thereof, furnish defendants, without cost, with water from the reclamation project in an amount equal to their appropriations from Bitter Creek granted by the State of Wyoming.

The decision of Judge Riner was in favor of the defendants, the oral statement by the court at the close of the hearing being found on page 383 of the record, his written memorandum on page 103, and the decree on page 108.

There are two principal issues involved: (1) Whether the United States has a right of way across the lands of appellants, which entitles its officers to go upon such lands and make the excavations above described without making compensation for the injuries caused and (2) whether the appellants, who own the school section, have rights to the waters of Bitter Creek to the extent of their appropriations from the State, which are superior to the right of the United States to such water.

II.

Specifications of Errors.

The appellants assert that the Circuit Court of Appeals erred in the following particulars which are specified in the order in which they will be urged and argued.

FIRST: That the court erred in holding and deciding that Bitter Creek is not a natural stream or water course within the meaning of the constitution and laws of the State of Wyoming.

SECOND: That the court erred in holding and deciding that the appellee had a right of way for the construction of a drainage ditch in the channel of Bitter Creek across the homesteads of appellants Ide and Caldwell.

THIRD: That the court erred in holding and deciding that the appellee had a right of way for the

construction of a drainage ditch in the channel of Bitter Creek across Section 36, Township 56, Range 99, which had been purchased by appellants from the State of Wyoming.

FOURTH: That the court erred in finding and holding that appellants had acquired no rights to an appropriation out of Bitter Creek of water from the natural run-off of the Bitter Creek water shed.

FIFTH: The court erred in finding and holding that appellee had not exhausted its rights in the water appropriated by it when it disposed of such water to settlers for use in the irrigation of land, and in finding and holding that appellee could recapture and again use such water after it became waste and seepage water.

SIXTH: The court erred in finding and holding that appellee had not abandoned the water which it permitted to escape, seep and percolate into Bitter Creek.

III.

Brief of the Argument.

A. Bitter Creek is a Natural Stream.

Since the right to the appropriation of the waters of the State exists only as to the waters of "natural streams, springs, lakes, and other collections of still water" appellants claim to a prior right to the use of the water of Bitter Creek by virtue of the Certificates of Appropriation from the State of Wyoming is dependent on a finding to the effect that Bitter Creek is a natural stream.

The trial court, after considering the evidence, found (Page 383 and 103) that Bitter Creek is a

natural stream or water course. He found that it was a stream having a channel with well defined bed and banks, in which, independently of any seepage water brought into it from the reclamation project, it had regularly a flow of water which lasted until about May 1st of each year. He concluded as a matter of law that such a stream is a natural water course.

It is not clear from the statement and opinion of the Circuit Court of Appeals (Page 395) whether the reversal of Judge Riner's decision in this respect is based upon a disagreement with him as to the effect of the evidence, or on a disapproval of the conclusion reached by him, but we confidently assert that the reversal was erroneous on whichever ground it was based.

We think that an analysis of the evidence will show that the finding of the trial court is supported by the weight of the evidence. It is conceded that it is now a stream with a very considerable flow of water, but it is contended by the appellee that all of this flow is water developed by the reclamation project and wasting or seeping into the creek, while the appellants contend that there is a flow in the stream from the natural run-off resulting from the snow melting in the watershed, continuing each year until about May 1st when the flow first commences to be affected by the irrigation water of the project.

Of the twenty-five witnesses, for plaintiff-appellee, who testified on this issue to the effect that there was no natural run-off, eight were engineers for the reclamation project, who had no personal knowledge of the condition of Bitter Creek prior to the time the project waters were first brought into the watershed, nor during the times of year, since that time, when

appellants contend that there is a natural flow in the stream, and they merely expressed the theory that judging from the recorded annual precipitation in the watershed it would be impossible that there be any flow of water in Bitter Creek. They ignored the testimony of other witnesses and the finding of Judge Riner that the prevailing winter winds blow a large quantity of snow across the ridge to the watershed and deposit it in the gullies on the Bitter Creek side. The remaining seventeen witnesses, most of whom were members of a Mormon colony located at Byron a number of miles below the mouth of Bitter Creek, merely testified to a more or less familiarity with the Bitter Creek watershed and to more or less frequent casual visits to the vicinity of the creek while engaged in riding for stock or doing teaming. These witnesses all furnished what Judge Riner characterized as negative testimony to the effect that they had never seen water flowing in the creek. With very few exceptions, these witnesses did not claim to have made their observations during the particular months in the spring of the year when it is contended by appellants that the water did flow. A great deal of emphasis was placed upon the testimony of the witnesses from Byron to the effect that during the winter and spring of 1901 an outfit camped and had their stables built in the bed of Bitter Creek at its mouth and that no water flowed in the creek to disturb them. It was testified that 1901 was an unusually dry year, and moreover it is a fact of common knowledge that in streams of this character in this arid country it is not only possible but of common occurrence that water flows in the upper portions of streams in considerable quantities, but never reaches their mouths. The point at which appellants diversions are made and where

it is contended that the natural spring flow occurs is about twelve miles above the mouth.

Many of the witnesses for appellee displayed such a partisan desire to make the testimony favorable to appellee that they made statements which were contradicted by their fellow witnesses. For example, most of the lay witnesses, who claimed such familiarity with Bitter Creek since 1900, testified that Bitter Creek had no well defined bed or banks any further up its course than Garland, (which is about five miles below the school section in controversy). A typical example of this testimony is that of S. W. Robinson, (Page 120), who on page 121 says, "The first place I could find something that might represent Bitter Creek was below Garland * * * I never saw any well defined bank or bed of any stream above Garland. There might have been, but I never saw any." Not one of the other witnesses of this class, who testified from recollection as to the condition of Bitter Creek during the period ten to eighteen years prior, or from 1900 to 1908, when the project waters first affected the flow, said that the creek had a well defined channel more than two miles above Garland, whereas Jeremiah Ahern (Page 139), who was the engineer who surveyed the watershed for the reclamation project in 1904, testified (Page 139) "From Garland for about five or six miles south on the flat it had a pretty well defined channel" and (Page 141) "Above Garland it has a well defined channel for five or six miles possibly which would bring it to a point north of Powell to about a couple of miles above the junction of these branches. The channel there is not so deep nor so wide. To that distance, the banks are fairly well defined." The branches referred to by the last witness were proved (page 291) to come together on the school section and

the testimony of the previous witnesses, above referred to, had been given in response to efforts of counsel for appellee to prove that the stream had none of the characteristics of a water course at that point.

Opposed to this negative and, in many respects, conflicting testimony is the positive testimony of eleven witnesses for appellants, all of them except Charles Grant Caldwell absolutely disinterested, to the effect that they had observed this continuous annual flow of water in Bitter Creek during the spring months.

Thus L. J. Willis, a cattle man and County Commissioner of Big Horn County, testified (Page 288 et seq.) that in the spring of 1901 he was ranging cattle along Bitter Creek and rounded them up at the forks which were upon the school section; that there was quite a flow of water in Bitter Creek that spring during March and until the last of April; that during the succeeding five years, he ran cattle there in the winters and springs and would see the creek possibly once or twice a week and that there was running water in the creek each spring until the last of April, at which time he would take his cattle into the mountains and would see no more of the creek until the following winter. He testified in considerable detail as to the character and amount of the flow, and gave testimony which should greatly outweigh the negative testimony of casual observers that they had not seen water flowing in Bitter Creek. This witness also gave a detailed description of the well defined bed and banks of the stream as they existed at the points in controversy during the years above mentioned.

Testimony similar in character to that of Mr. Willis, both as to the flow of the water and the character of the bed and banks of the stream, was

given by Paul Richter, (Page 310), who had ranged sheep along Bitter Creek from 1901 to 1907; J. W. Beatty, (Page 313), who since 1901 had lived at Garland as merchant and farmer; Charles A. Marstrom, (Page 316) who rounded up cattle in that vicinity in 1885, 1886, and 1887; Charles A. Davis, (Page 317) who ran stock and lived at Garland about one hundred yards from Bitter Creek from 1901 to 1911; William Woodruff, (Page 320) who since 1904 ranged sheep on the Garland bench as camp tender and herder; Gilbert E. Gowey, (Page 323 and 326); Ira A. Goddard, (Page 329) and W. A. Shoemaker (Page 346). H. S. Ridgely, (Page 302) a lawyer, formerly United States District Attorney for Wyoming and formerly a resident of Cody where he was attorney and general manager of the interests of Col. Cody which included the irrigation project afterwards absorbed into the Shoshone Reclamation Project, testified that he was familiar with the Powell Flats and with Bitter Creek and had been all over the flats many times; that he has many times seen water running in Bitter Creek at Garland prior to the time when the reclamation project first introduced water into the watershed. He relates a particular instance in March, 1906, when he followed Bitter Creek and that water was running in it at that time.

As some of the witnesses, for example William Woodruff, (Page 321) testified, and as the trial court found (Page 104) the prevailing winter winds drive much snow across the divide onto the Bitter Creek side of the bench where it accumulates and packs in the gullies, so that the records kept in Powell as to the average annual precipitation would furnish no proper basis for the testimony of plaintiffs' witnesses

that there could not possibly be any water running in Bitter Creek.

The testimony of appellant Charles Grant Caldwell is found on page 291, et seq., of the record. It is true, as stated by Judge Carland that he was directly interested as a party defendant, yet Judge Riner, in his statement (Page 383) said, "Mr. Caldwell gave the court more information than any other witness on the stand. He was frank and fair." While this witness had no knowledge of conditions prior to the development of the reclamation project, he did testify that since 1910 he has lived on his homestead on the banks of Bitter Creek; that each year, prior to the time when water is turned into the Government distributing canals and usually about March 1st of each year, water commences to flow in Bitter Creek, gradually increasing in volume until sometime in April when it gradually decreases until about May 1st, when the Government turns water into its ditches and within a day or two thereafter the waste water comes down and accelerates the flow; that there is a continuous flow each spring from about March 1st until May 1st, when Government irrigation begins and the flow is thereafter increased; that when the Government distribution stops in the fall of the year, the flow of water in Bitter Creek ceases within eighteen to thirty hours thereafter and the creek then becomes dry and remains so until the spring flow commences; that (Page 301) since the creek becomes dry as soon as the irrigation water from the project is turned off in the fall, he assumes that the water which runs in the creek in the spring before the irrigation water is again turned on is not seepage water nor water from the project, but is a natural run-off from the watershed. This, it seems to us, is a reasonable conclusion and the

only one which can be drawn from the facts, and is corroborated absolutely by the testimony of other witnesses for appellants above referred to. Moreover, it is testimony based, not upon recollection, but, on conditions as they exist and are observed today. It is significant that although this testimony was given in open court at the trial in the presence of several of the officers of the project and of numerous other of plaintiff's witnesses who were also familiar with the facts testified to by Mr. Caldwell, and although they had the opportunity to contradict his statements, not a single word of testimony was offered by appellee in rebuttal of Mr. Caldwell's testimony.

We therefore believe that from a reading of the record itself, it must be concluded that the weight of the evidence established the fact that Bitter Creek is a stream having well defined bed and banks in which from time immemorial water from rains and melting snow has run each spring from the time the snow commences to melt until about May 1st.

Moreover, this was the conclusion of the trial court arrived at after having seen many of the witnesses on both sides, and after having heard their testimony, and under a well established rule of law, his finding, based upon conflicting evidence, and certainly having ample evidence to support it, should not have been disturbed on appeal. Both in his written memorandum (Page 104) and in his oral statement made at the conclusion of the hearing, (Pages 383 and 384) the trial court commented upon the appearance of the witnesses and the character of their testimony, particularly it is disclosed by his oral statement that in reaching his conclusion he took these things into consideration. He stated, "Mr. Caldwell gave the court more information than any

other witness on the stand. He was frank and fair. He said this stream was a flowing stream from right along about the first of March to the last part of April or May when it dries up until the reclamation service begins to use its ditches and then drains from these lands would again make it a flowing stream. His statement clears the situation very much for the court. The engineer, (Witness for plaintiff, appellee) we had on in the morning and took two hours to examine, did not answer a single question directly. He argued everything, so I think it would be difficult for the court to get much from his testimony." It is thus apparent that this is a case where the reason for the rule is unusually forceful and that the Circuit Court of Appeals was in error in distrubing the finding of fact of the trial court.

We therefore assume that for the purpose of this trial, this court should and will consider that as found by the trial court Bitter Creek has been from time immemorial a stream having well defined banks and bed in which water flows regularly each spring for several months, such water being the natural run-off of the watershed coming from the spring rains and the melting snow, which during the winter accumulates on the bench. We think it is clearly established by the authorities that a stream having these characteristics must be held to be a natural water course.

From an analysis of the authorities, Kinney states the rule as follows:

> "According to the almost unanimous weight of authority, one of the necessary essentials of a water course, is not only water from a definite source of supply, but it must be running water. The water must have a current. There must be

a definite source of water supply, which is permanent in the sense that similar conditions will always produce a flow of water, and that these conditions recur with some degree of regularity, so that they establish and maintain for considerable periods of time a running stream. As we have seen in a previous section, in order to constitute a water course, there must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. This is true in its strict sense, but surface water may collect from so large a drainage area and be so continuous in its flow as to form the definite source of supply for a water course below."

1 Kinney on Irrigation, 2nd Ed., P. 495-6.

"We have stated before that a water course does not include surface water conveyed from a higher to a lower level, for limited periods, through no definite channel, during periods of extraordinarily high water; neither is it an essential characteristic of a water course that the flow of the stream must be continuous. In other words, no extraordinarily large or minimum amount of water is required. But at times a water course may be entirely dry; however, it must have a well defined and substantial existence. Those who are acquainted with the streams and water courses of the arid Rocky Mountain Region of this country, draining as they do steep, mountainous areas with their swift currents, running over gravelly and rocky bottoms, know that often in the dry summer months many of them are entirely dry, at least upon the surface. All of them, nevertheless, have well defined beds, channels, banks and currents of water, at least the greater portion of the year, and are in every respect water courses to which water rights may attach. But it would be

plainly impracticable in this western part of the country to require that, in order to constitute a water course upon which rights may attach, there must be a continuous, uninterrupted, and perennial flow of water during the entire year, and from year to year. Hence the requirement of the law is that in order to constitute a water course the stream need not flow all of the time."

1 Kinney on Irrigation, 2nd Ed., p. 498-9.

In the case of Simons vs. Winters, 21 Ore. 35, 27 Pac. 7, which was a controversy over the water rights in a stream similar in character to Bitter Creek, the question as to whether the stream was a natural water course within which water rights might be obtained was raised, and the supreme court of Oregon analyzed the authorities and held as follows:

"When there is a living stream of water within well defined banks and channel, no matter how limited may be its flow of water, there is no difficulty in determining its character as a water course, but when the stream is of that class which periodically or occasionally flows through ravines, gullies, hollows or depressions in land and by its flow assumes a definite channel such as indicates the action of running water, there is often some difficulty of distinction. * * * 'If the face of the country is such,' said Williamson, C., 'as necessarily to collect in one body so large a quantity of water after heavy rains and the melting of large bodies of snow, as to require an outlet, and if such water is regularly discharged through a well defined channel which the force of the water has made for itself and which is the accustomed channel through which it flows and has flowed from time immemorial, such channel is an ancient natural water course.' Earl v.

DeHart, 12 N. J. Eq. 280. 'In a broken and bluffy region of country,' said Mitchel, J., 'intersected by long deep gullies or ravines, surrounded by high steep hills or bluffs down which large quantities of water from rain or melting snow rush with the rapidity of a torrent, often attaining the value of a small river and usually following a well defined channel, such streams partake more of the nature of natural streams than of ordinary surface waters, and must at least to a certain extent be covered by the same rules.' McLure v. City of Red Wing, 28 Minn. 186, 9 N. W. 767. In Boggs v. Williams, 25 Kan. 214, it is held where surface water from rains and snow in a hilly country seeks its outlet through a gorge or ravine and by its flow assumes a definite channel with well defined banks such as will present to the casual glance the unmistakable evidence of the frequent action of running water and through which at regular seasons the water flows and has done so immemorially, such stream is a natural water course. In West v. Taylor, 16 Ore. 172, 13 Pac. 669, Strahan, J., said that 'Water which has accumulated from spring rains and melting snows and which has flowed several miles between regular banks of a well defined water course, must be deemed a water course.' The conclusion to be deduced from these decisions is that a water course is a stream of water usually flowing in a particular direction with well defined banks and channels but that the water need not flow continuously. The channel may sometimes be dry; that the term 'water course' does not include water descending from the hills down the hollows and ravines without any definite channel only in times of rain and melting snow; but that where water owing to the hilly or mountainous configurations of the country accumulates in large quantities from rain and melting snow and at regular seasons descends and in its outward flow

carves out a distinct and well defined channel which even to the casual glance bears the unmistakable impress of the frequent action of running water and through which it has flowed from time immemorial, such a stream is to be considered a water course and to be governed by the same rule."

In Brown v. Schneider, 106 Pac. 41, the supreme court of Kansas laid down the rule as follows:

"It is not essential to the existence of a 'natural water course' that the source of supply should be living water. It may be surface water collected on a large watershed from rains and melted snows which concentrates and cuts for itself a well-defined channel and regularly discharges through such outlet. Nor is it essential that there should be a constant and continuous flow of water. The supply is sufficiently permanent, when, as in this case, the water is concentrated and flows with some regularity during the heavy rains which ordinarily occur in that region." "To constitute a 'water course' it is not necessary that the supply should be from springs, nor yet that the water should be discharged through a channel into another water course. The fact that the channel of the stream in question grew less distinct and that it practically passed out of sight before the waters reached Dry Creek, does not argue that the stream lacks the characteristics of a water course."

Cases holding to the same effect are so numerous that no attempt is here made to cite them all, and we shall merely call attention to the later cases, particularly from the courts in the semi-arid country where the practice of irrigation generally prevails. These

courts uniformly hold that streams of the character of Bitter Creek are natural water cources.

In City of Globe vs. Shute (Ariz.) 196 Pac. 1024, it was sought to hold the city liable for constructing a tile culvert in the bed of a wash so that it discharged waters in more damaging quantities upon the land of plaintiff. The defendant city contended that there was no liability, since the wash was not a natural stream and therefore it was within its rights in discharging surface water upon the land of plaintiff. In response to this contention, the court held "We find no difficulty in holding that the ravine or wash is a natural stream or water course in the sense of the law where the rain or snow falling on the adjacent hills runs down the ravine or wash in a regular channel at irregular intervals."

Still more closely in point is the case of San Gabriel Valley Country Club vs. Los Angeles County, 188 Pac. 554, which was founded upon a similar cause of action and in which a similar defense was interposed. The facts with regard to the character of the stream in question were stated by the court as follows: "These streams are dry except during and immediately after the rainy season, that is, except during the winter and spring. During the rainy season, however, they at times of storms discharge onto the plain a very large volume of water." In passing upon the question, the court held as follows: "It is a water course in the legal sense although dry except in the winter and spring and very possibly at intervals even in these seasons. It has a channel with defined bed and banks made and habitually used by water passing down as a collected body or stream in those seasons of the year and at those times when the streams in the region are accustomed to flow. It is wholly different from a

swale, hollow or depression which may pass surface waters in the time of storm not collected into a defined stream."

In the case of Lindblom v. Round Valley Water Company (Cal.) 173 Pac. 994, where plaintiff's claim of riparian rights in a stream very similar to Bitter Creek was contested on the ground that such stream was not a water course, the court in its opinion stated as follows:

> "The record leaves no room for doubt that before any dam was constructed, there was in the winter and spring of each year a discharge of a stream of water from the northerly end of the valley into and through North Canon. This stream was of the character familiar in this state and in other semi-arid regions. It carried a substantial current of water during the season of rainfall and thereafter, while the snows in the surrounding mountains were melting: but the flow ceased entirely as the dry summer season advanced. In ordinary seasons water began to run in November or December, and ceased about June. The bottom of Morre Canon bore every aspect of a well defined channel. It is of course not necessary to the existence of a water course that the flow should be continuous throughout the year. * * * The finding that North Canon was not a water course was apparently based upon the theory that the waters running down the ravine were flood waters and hence not a part of the stream to whose flow the riparian owner was entitled. * * * The evidence is clear to the effect that the water running into Round Valley consisted of the run-off from the usual and annually recurring fall of rain and snow. Such water when running in a defined stream constitutes a water course to which the riparian proprietor's rights attach."

In a recent case the circuit court of appeals for the Ninth Circuit has considered this question in relation to a stream almost identical in character with Bitter Creek, and has held such stream to be a natural water course. This is the case of Oregon-Washington R. & Nav. Co. v. Royer, 255 Fed. 881, in which the court said:

> "The contention of the railway company as embodied in a request for an instruction is that the only justifiable conclusion from the evidence is that what the plaintiff called the channel of Spring Creek is nothing more than a drain for surface water resulting from melting snow in the drainage area above the lands affected, and that except from the water of such melting snow Spring Creek in its channel carries no water, and is dry for eleven months of the year, and that as a legal consequence the surface water became a 'common enemy' against the flowage of which the land owner was obliged to defend himself. But the District Court declined to sustain such a position and submitted the case to the jury upon the theory that Spring Creek is a natural water course. * * * To test the ruling of the court it becomes necessary to get a clear understanding of the physical situation. Spring Creek has its origin in the Rattlesnake Hills some fifteen or sixteen miles northwest from the lands of plaintiff. * * * The general lay of the land from where Spring Creek has its origin is rolling, but the creek is in a canon for fourteen or fifteen miles and until a short distance from the railway right of way, where the ground spreads out flat; the point at which the creek begins to widen being the north line of the southeast quarter of the southeast quarter of section twenty. Up to that point the channel, though irregular in width and depth, is well defined and drains twenty thousand

> or twenty-five thousand acres of land. * * * The water which is caused by snow melting in the hills only flows during the spring. The amount of snow during a season varies from nothing to eighteen inches. During seasons when the snow melts gradually and there is no frost in the ground, the water is absorbed and there is none in the creek, and when the ground is frozen and the snow in the hills is melted by a Chinook wind, there is water in the creek. * * * We think the court was right in holding that under the facts Spring Creek was a natural water course. The water which flowed through it came from snow melting in high hills and for several miles flowed naturally through a well defined channel between banks down to the point just above plaintiff's land. * * * The facts that the water which went down the channel came from melting snow and that there was a flow for but a few months in the spring, do not necessarily take away the characteristics nor elements of a water course."

Appellant, in the examination of witnesses at the trial, seemed to lay great stress on testimony that Bitter Creek had no definite source in the shape of living springs. The authorities cited above hold that in order to constitute a natural water course there need not be such a definite source, but that the water flowing in a well defined channel will constitute a natural water course although it arises from rain or melting snow, which is the source of the natural run-off from the channel of Bitter Creek.

Bitter Creek, like the streams involved in the cases cited above, is located in an arid country where the annual precipitation is slight and where all streams, except a few large rivers, are, like this one, intermittent in character, flowing only during the spring

of the year, and therefore the test as to what constitutes a natural water course should be that applied by the courts with reference to streams in territory of a similar character. Wyoming is a country of limited rainfall and it is a matter of common knowledge that the agricultural development of this state, as well as of the other states in the arid and semi-arid regions, is dependent very largely upon the application of the water of its streams to the purpose of irrigation. It is not only a matter of general knowledge, but the testimony of the State Engineer (Page 355) discloses that a large proportion of the irrigation projects within the state are dependent upon the appropriation of water from streams very similar in character to Bitter Creek in its original condition in which water flows for a limited time only during the spring of the year. The testimony of the State Engineer was as follows: "There are innumerable instances in Wyoming where water has been appropriated from sources of supply where the flow of water is intermittent in character. There is a natural run-off down the water course and almost always the entire flow is confined to a few weeks in the spring of the year and during the rest of the season the water course is entirely dry except in cases of exceptionally heavy rain." Since under the laws of the State, valid appropriations can be made only of the waters of natural streams, an adjudication to the effect that a water course of the character of Bitter Creek is not a natural stream will result in the destruction of innumerable appropriations of water already made, which will render innumerable irrigation plants valueless with a corresponding diminution of values of land, the established value of which depends to a large extent upon the recognized validity of the water rights appurtenant thereto. If such water courses

are not natural streams subject to appropriation, no other legal rule with respect to the acquisition of a right to use the water therein exists and only the law of might applies.

In no case, which we have been able to find, has the utilization of the water for beneficial purposes been made a test as to whether the stream is a natural water course. Certainly the two cases cited by Judge Carland on page 402 in support of the rule laid down by him to that effect do not so hold, nor is there any more reason why a stream should be required to meet such a test with respect to duration of flow than with respect to volume of flow and there could be no question but what a continuously flowing stream would be considered a natural water course, although the flow is so small in volume as to be of no economic importance, and we submit that in imposing a test of this kind the Circuit Court of Appeals was in error. Moreover, the court was in error as to the facts when it said (Page 402) that "The stream in question when subjected to this test wholly fails," since it was established by the testimony of Mr. Caldwell, (Page 301) that he utilizes for irrigation and stock purposes the natural run-off flowing in the creek in the spring before the Government turns water into its system.

It is perhaps true, as stated by Judge Carland (Page 402) that the State of Wyoming cannot make a creek a natural stream merely by issuing a permit to take water therefrom, but it is also true that the legal character of the stream involves no federal question (Mettler v. Ames Realty Co. [Mont.] 201 Pac. 702) and that the State may recognize the right to appropriate any kind of unowned water within its borders and the state officials are vested with power to determine as to the character of the stream which comes

within the constitutional provision and the waters of which are subject to appropriation, and the fact as established (Page 355) that from the earliest days appropriations from intermittent streams similar to Bitter Creek have been recognized and encouraged by the State and permits therefor granted by the State Engineer is therefore of great if not of conclusive weight in determining whether a stream of the character of Bitter Creek, located within the State, is to be regarded in law as a natural water course. This is particularly true because appellee and its officers, in carrying on their activities with reference to Bitter Creek, are required to proceed in conformity with the laws of that State, as is more particularly pointed out hereafter in discussing the Status of Appellee.

B. Status of Plaintiff.

Appellee is acting under and pursuant to Act of Congress of July 17, 1902, and whatever authority and rights it may claim are derived from such act. At the beginning of the discussion, therefore, it will be well to consider the status of appellee. Section 8 of the Act provides:

> "That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the law of any state or territory relating to the control, appropriation, use or distribution of water used in irrigation or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of the Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any state or of the Federal Government in, to, or from any interstate stream or

waters thereof; provided, that the right to use the water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."

In Twin Falls Canal Co. vs. Foote, 192 Fed. 583, which was a suit to enjoin the officers in charge of a reclamation project similar to the Shoshone Project from interfering with the water rights growing out of an appropriation from Snake River, the court held:

> "It will be further borne in mind that the subject matter of this action is not, directly at least, the right to collect dues or enforce contracts, but to use the flow of a certain stream of water. This right of the government, such as it possesses, is of the same quality and is derived from the same sources and rests upon the same basis as that of the plaintiff or any other claimant. Not in its sovereign, but in its proprietary capacity, as the owner of arid lands, it acquired such right by complying with the laws of the state governing the appropriation and use of water for beneficial purposes. Congress was careful to make clear its intent in this respect, for by Section 8 of the Act it declared: * * * In acquiring the right, therefore, and in using it, the Secretary of the Interior is not authorized to act independently of, but is directed to proceed in conformity with and subject to the laws of the state."

It must be remembered, then, in considering the questions hereinafter discussed, that plaintiff in its operations affecting Bitter Creek and the property of defendants, occupies the same position and has the same standing as any individual claimant of water rights and easements, and is subject to the same rules

of law. It is subject to the laws of the State of Wyoming governing water rights and water courses.

C. Effect of Reservations of Right of Way in Patents from the United States.

The homestead lands of appelles Arthur W. Ide and Charles Grant Caldwell are within the Shoshone Reclamation Project and the patents issued for these homesteads contain reservations unto the United States of

> "Rights of way over, across and through said lands for canals and ditches, constructed *or to be constructed*, by its authority, etc."
>
> (Record 230, Plaintiff's Exhibit 1-A.)

The right of way reservation as stated in the patents is broader than the terms of the statute; (26 Stat. 391) approved August 30, 1890, which merely provides that in all patents for lands thereafter taken up under any of the land laws of the United States, or in entries or claims validated by the Act west of the 100th meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches and canals, constructed by the authority of the United States. No authority can be found in the statute for reserving a right of way thereon for ditches and canals "to be constructed" by authority of the United States.

It is true that the case of Green v. Willhite, 160 Fed. 755 (Idaho); Green v. Willhite, 14 Idaho 238; 93 Pac. 971 and U. S. v. Van Horne, 197 Fed. 611, (Colo.) are cited by appellant as authority for an interpretation of the statute that would warrant reservations for rights of way for purposes of future construction.

But these cases as we read them, are based upon the assumption that Congress, in enacting the statute, had in mind a well known purpose of the Government to reclaim its arid lands by conducting water upon the, etc.

The statute of August 30, 1890, relates to desert land entries and ditches constructed across the public domain for the reclamation of lands included in such entries. There is no evidence of a purpose, known or unknown on the part of the Government in 1890 to reclaim its arid lands, and in fact the Government did not embark upon a reclamation policy until June, 1902, about 12 years subsequent to the enactment of the statute in question. Congress did not intend that reclamation homesteads taken up, improved, cultivated and made productive and valuable by a great expenditure of time and labor might be ruthlessly invaded, damaged or even totally destroyed at any future time, that United States reclamation engineers might decide to direct extensive excavations thereon without compensating the owners. This is exactly what has happened to the homesteads in question as a result of extensive excavations of gravel and other materials from the channel of Bitter Creek, and the construction of an extensive diversion drainage canal out of Bitter Creek across the lands of Mr. Ide to what is known as the Garland Canal.

Moreover it is the contention of appellees that by such reservation of a right of way, the United States is not thereby given the right to excavate and deepen the channel of a natural stream without a permit from the State of Wyoming, nor to interfere with lawful appropriations of water from such a stream, and that since appellant in attempting to exercise such claimed right of way has done these things, its acts are unlawful

and render it liable to any damages caused thereby. Appellants purpose in making the excavation complained of is concededly for the purpose. in part at least, of diverting the waters of Bitter Creek. For the reasons hereinafter to be elaborated, appellant by so doing interferes with water rights previously appropriated by and belonging to some of appellees under permits from the State of Wyoming, and its act in so doing was unlawful. Moreover, appellant in its status as outlined in Subdivision III hereof, is entitled to divert water from or interfere with the bed of a natural stream only when permitted to do so by the state authorities, Wyoming Compiled Statutes 1920, Section 838, which provides as follows:

> Section 838. Application — How Endorsed. The refusal or approval of an application shall be endorsed thereon and a record made of such endorsement in the state engineer's office. The application so endorsed shall be returned to the applicant. If approved the applicant shall be authorized, on receipt thereof, to proceed with the construction of the necessary works, and to take all steps required to apply the water to a beneficial use, and to perfect the proposed appropriation. If the application is refused, the applicant shall take no steps toward the prosecution of the proposed work, or the diversion and use of the public water so long as such refusal shall continue in force.

Appellee's application to the state for such a permit was denied by the State Engineer, and appellee never made an effort to have that decision reversed, and has made no further effort to secure a permit, but has elected arbitrarily to alter the channel of Bitter Creek and to divert all of the waters thereof in defiance

of the laws of the State and of the permits for the appropriation of the waters of that stream granted to appellants by the state. For this reason also, its acts in making these excavations are unlawful, and are not such as would be protected by the reservations contained in the patents.

Section 8 of the Reclamation Act of June 17, 1920, supra, under which appellee is acting, expressly provides that in the administration of the act, the laws of the different states and the rights of water appropriators shall be respected, and that nothing shall be done under said act that will injure or destroy the rights of appropriators under said irrigation laws. Surely appellee can not with reason contend that the reservations in the patents from the United States is of a right to go upon appellant's lands and commit these depredations in utter disregard of the laws of the State and the rights of the appropriators of the water of Bitter Creek. The statutes of Wyoming (Compiled Statutes 1920, Section 866), provides a procedure by which appellee might, if entitled thereto, have acquired a right to the use of the channel of Bitter Creek.

D. Right of Way Across Land Purchased from State.

An entirely different question is presented in determining whether appellee has a free right of way across the school section. As has been stated, the appellant Charles Grant Caldwell is the owner of a homestead, title to which was procured from the government. In addition he is the owner of a portion of the adjoining school section, other portions of which, all crossed by Bitter Creek, are owned by the appellees Agnes H. Caldwell, Thornburg and Althoff.

The reclamation service officials have forcibly and against the protest of the owners, entered upon these portions of the school section and have excavated a vast amount of material from the banks of Bitter Creek which has been heaped upon the adjoining land without the slightest effort so to dispose of the material as to modify the ensuing damage as much as possible. This has not only actually ruined many acres of very valuable land owned by these respective appellees, but has seriously depreciated the market value of the remaining land by ruining the sightly appearance of what had once been beautiful farms. The effect of this work cannot be well pictured, but a somewhat adequate idea of the conditions may be derived from the testimony of the defendant C. G. Caldwell, (Page 298), who stated with respect to the piling up of this excavated material in a like manner upon his adjoining homestead, that a hillock had been created so high as to prevent him from seeing from his house that part of his farm lying north thereof.

It was in part to enjoin the defendants from interfering with this ruinous work upon the school section that the government instituted this action for injunction, and it will be observed that the right of the government to secure such relief as well as the right of the appellants under the stipulation to compensation for the damage caused by this work, involves a question wholly distinct from any question of irrigation law, and that the government must show a legal right to enter thus forcibly upon the lands owned by these appellants and only if such right is shown does it become necessary with respect to this branch of the case to consider whether Bitter Creek is a natural stream whose channel and whose waters are subject

to appropriation, which having been made, prevents interference by the government with the channel and stream.

The government claims to find its authority for this outrageous trespass in Section 4954, Wyoming Compiled Statutes, 1920.

> "There is hereby granted over all the lands now owned by the State of Wyoming, which may hereafter be owned by the State of Wyoming, a right of way for ditches, tunnels, telephone and transmission lines constructed by and under the authority of the United States; Provided, always, That any such right of way desired by the United States shall be surveyed and platted and certified maps and plats of such right of way filed with the secretary of state and with the state board of land commissioners having control of any such said lands, such maps and plats to be in conformity with the requirements of Section 5371 regarding rights of ways for railroad corporations, and no fee shall be required for the filing of any such said maps and plats; and Provided, further, That all conveyances by the state of any of its lands, which may hereafter be made, shall contain a reservation for rights of way provided for in this act."

We do not contend, as Judge Carland intimates (Page 404) that reservations made in deeds of conveyance, pursuant to this statute, are void, but that such a reservation is limited in its application. It grants to the government, without doubt, a right of way for irrigation works across all lands owned by the state. There is, however, no justification in the language of the statute for extending this right of easement to lands not owned by the state at the time attempt is made to comply with the provision of the

first proviso in the statute, but title to which has passed to private individuals, as is the case here where this school section was purchased by Caldwell in 1910, eight years before the government sought to secure its right of way by filing the necessary maps, and the patent to which was executed by the state prior to the filing of such maps.

The construction placed upon this statute by the government seems to us to be certainly erroneous and to be entirely inconsistent with the plain terms of the statute itself.

The federal statute reserving to the gov ment rights of way, being the statute under wh.h the reclamation service officials have entered upon the homesteads of Caldwell and Ide, is quite different in terms from the state statute and clearly reserves to the government such a right across lands already patented, but even under that statute the courts have adopted a rule of strict construction and have read into the law, as it were, a number of qualifications which are absolutely necessary in order to make it an honest law, which would not deprive a patentee of property which the government had pretended to convey to him; and inasmuch as a construction of the state law which would permit the government to make forcible entry upon lands already patented by the state to private individuals would then compel the courts to read into the statute provision after provision for the protection of the private owner from the unreasonable exercise by government officials of such power, or from the imposition upon that owner of an overwhelming private loss for an unconsequential public gain, we are confident the courts will not be prone to construe this statute as giving any such power to the government, unless such construction is inevitable.

Not only is the construction contended for by appellee not necessary, but it is wholly unjustified. In the first place, there is not a word in the law expressly declaring that the easement shall exist for ditches constructed after the state has sold the land. The only clause from which any such construction can be forced is in the final proviso which according to ordinary rules of statutory construction can not be used to extend the body of the act, but must be construed as in some manner qualifying or limiting the preceding provisions. In any event, the proviso is not susceptible to the construction placed thereon by the government. It says that in all conveyances made by the state after the date of the act the right of way to the government should be reserved. The simple, primary and honest meaning of this provision is only that if rights of way across state lands have been acquired by the United States by filing maps therefor, in any subsequent conveyance by the state of that land such right of way should be reserved. This is honest, because the state should not offer to convey the entire unencumbered fee to its purchaser if in reality the government had acquired a right of way for certain ditches; it is necessary because the government in the building up of its tremendous projects might not enter upon the actual construction of the proposed ditch across the state land until long after the sale had been made by the state, and the purchaser and his assigns would by this reservation be placed upon notice of the government's right and of the proposed location of the government's ditch as shown upon the maps on file, and would thereby be enabled so to locate their improvements and improve their farm as to avoid grave damage when the government should finally enter upon the construction work.

But we have said that the construction placed upon the statute by the government is actually contrary to the clear terms of the statute itself, and here we refer to the first provision of the section requiring that a map of any such right of way desired by the government shall be "filed with the Secretary of State and *with the State Board of Land Commissioners, having control of any such said lands.*" Unless this statute is construed as creating an easement over only lands still owned and controlled by the state, which would make of it a fair and reasonable statute the enforcement of which would lead to no complications and which would impose upon private persons no unfair loss, the quoted provision is meaningless. The present case presents the question squarely. The state sold these lands in 1910, the certificate of sale containing no reservation whatever; it issued to the several defendants deeds for these lands under the certificate of purchase in June, 1918, the printed form of deed containing a general reservation which of course could have no other effect than the statute itself and must be construed as referring to rights of way already acquired by the government if such is the meaning of the statute itself; and the government made no move to assert any right of easement until July, 1918, either by commencing work or by filing the maps, and actually did not file the maps until August, 1918, after the commencement of this action, which, as has been said, is based upon a claim of legal right to enter upon the school lands without the consent and against the protests of the defendants.

How then could the government comply with the qualifying conditon of the statute that to acquire the right of way it must file maps with the board "having control of said lands." At no time since 1910 —

certainly at no time since June, 1918, when the state patents were issued — has any state officer had the slightest control over these lands; it was impossible for the government to comply with this requirement. The provision quoted not only permits but absolutely forces the construction of the law here contended for, namely, that it applies only to rights of way for ditches the plats for which have been filed prior to the sale of the land by the state. And if this construction be not accepted, the proviso quoted is either wholly disregarded or is unjustifiably amended by making it read that the maps must be filed with the state board which *once upon a time* had control of the land; and if this judicial amendment be made, how utterly ridiculous becomes this provision, for what possible purpose could there be in having maps of a proposed ditch filed with the board which had not the slightest interest in the land involved and which may have lost all interest therein decades before? And what possible notice of future intentions could thereby be given to the only person interested therein, namely, the owner of the land, who having made full payment to the state and having received his deed, had no further connection with the board?

We earnestly contend, therefore, that the clear meaning of this law is that the government may acquire rights of way across state lands when it files the maps thereof prior to sale by the state. This is a wholly reasonable statute as so construed, and no purchaser of the land can suffer loss, for he knows when he makes his purchase not only that the government reserves the right to construct a canal, but that the canal when constructed will follow a certain line, and he may direct his efforts in the improvement of the land with that knowledge and thereby avoid loss.

The construction contended for by the government is not only repugnant to one of the most important provisions of the statute, is not required by any other provision, but leads to a result which is wholly unsatisfactory not only from the standpoint of the judicial department which will then be compelled to read into the statute additional provisions to safe guard some of the supposed rights of the land owner; not only from the standpoint of the land owner, who always has hanging over him the possibility of government entry upon his land, which discourages his intensive development thereof, but even from the standpoint of the government itself, which not being able to secure a judicial ascertainment of the reasonableness of a proposed entry upon the land in advance thereof must complete its plans covering perhaps a large scheme each portion of which is dependent upon every other, must make the entry upon the private land and if opposed must then litigate with the land owner the question of the reasonableness of the proposed construction upon his land.

Moreover, even if the court should decide that, by virtue of the statute upon which it relies, the government has had reserved to it a right of way for a ditch across this school section, the reservation of a right of way for a ditch would not give any right to change and enlarge the channel of a natural stream through which flow the waters belonging to the state and subject to state control, particularly where such change and enlargement will interfere with water rights acquired by other persons in conformity with the laws of the state. The argument in the preceding subdivision hereof, with reference to the claimed right of way over lands patented by the United States, applies with greater force to the claim now under

discussion, and, we think, will bear reiteration. The reservation is for the right of way for ditches constructed "by and under authority of the United States." This contemplates the construction of a lawful ditch and one which the United States, acting in the capacity defined in Twin Falls Canal Co. v. Foote, supra, is authorized to construct. Plaintiff has secured no permission from the state to change or deepen the channel of Bitter Creek, nor has it been granted by the state any appropriations of water from such creek. On the contrary, its application for such appropriation has been denied, and since no appeal has been taken from such order of denial, it has been conclusively established by the state authorities that plaintiff has no rights to the waters of Bitter Creek. Nevertheless, without obtaining any authority from the state and without complying with the laws of the state, and without taking any steps to have its rights adjudicated, plaintiff has ruthlessly gone upon the land which defendants purchased from the state, altered and deepened the channel of a natural water course and destroyed water rights regularly granted to defendants by the state. Surely in so doing it was not constructing a lawful nor an authorized ditch, nor one which was within either the letter or the spirit of the reservation.

While it is true that the courts have recognized the validity of a reservation of a right of way which is general or indefinite, they have established the rule that the exercise of such right must be reasonable. (14 Cyc. 1161.) And the plaintiff is not making a reasonable exercise of the right in this case, assuming that it has one. It argues that the court cannot review the action of the reclamation service in determining the necessity for deepening Bitter Creek. Certainly

the court may determine whether the right of way claimed by plaintiff has been reasonably exercised, and as bearing on that question may consider whether any necessity existed for the exercise of the right and whether the work as constructed accomplishes its pretended object. The evidence shows that Bitter Creek has a fall sufficient to carry off all the water without any enlargement of its channel, (Page 158) and that it was deep enough to furnish an outlet to the drains without any deepening; (Page 186), certainly without deepening except at and near the drain outlets. Plaintiff sought to establish that the purpose of the deepening was to get the bottom of the creek down into the gravel so as to accelerate sub-surface drainage, (Page 151) but it was conclusively shown that where the channel was deepened through and above the school section the gravel was not reached, (Pages 159, 175 and 298) and hence the pretended object was not accomplished. Since it appeared from the deposition of one of plaintiff's witnesses, J. R. Iakisch, (Page 194) that the depth of the gravel could be ascertained beforehand by the use of a sounding rod, it follows that plaintiff knew or should have known that the pretended object would not be accomplished by the deepening, and hence the great injury done to appellants' land was unnecessary and wanton, the result of an unreasonable attempt to exercise the right of way alleged to have been reserved. Moreover, Sanford testified, (Page 183) that the purpose in making the excavation which cut off the diversion dam and headgate of the Garland Canal, was to give notice to the owners of the Garland Townsite that plaintiff claimed the water of Bitter Creek. It also appeared that the injury to defendants' land was needlessly aggravated by the manner in which the waste material was piled

upon the land; that no effort was made to level and distribute it as was done at other points along the work; also that the drain outlet across defendant Caldwell's land was left open to the great injury of the land, whereas all other drains similarly located were covered tile drains, and no satisfactory explanation of the discrimination was given. All this not only tends to show the animus of plaintiff's agents, but also discloses an unreasonable exercise of any right which plaintiff may have had.

Moreover, the authorities cited by appellee to the effect that discretionary acts of officials will not be reviewed by the courts hold, and only hold, that the courts can not direct the manner in which such an officer shall perform a discretionary act. They do not hold that a court may not, by injunction, restrain an official from performing an unlawful or wrongful act. Appellants are not asking the court to direct that the appellee shall conduct this reclamation work in any particular manner. We are merely asking it to forbid appellee doing these unlawful and wrongful acts to the injury of appellants. This is clearly within the power of the court.

E. Defendants are Entitled to Natural Run-off from Bitter Creek Watershed.

As heretofore pointed out, the evidence established the fact that there is water flowing in Bitter Creek each spring before the project waters are turned into the watershed, which appellants frequently use in irrigating their land, and that there are occasional rains during each summer which cause a natural flow in Bitter Creek which would be available to appellants for irrigation. Regardless, then, of what may be the

respective rights of the parties as to that portion of the water flowing in Bitter Creek which results from seepage and waste waters from the irrigation project, appellants by virtue of their appropriation permits from the state, have rights in the waters of Bitter Creek which have been unlawfully interfered with by appellee, and to this extent at least appellants are entitled to relief.

F. Extent of Right to Use of Water for Irrigation Purposes.

We maintain, however, that appellants by their appropriations pursuant to the laws of the state, have acquired prior rights in all of the waters now flowing in Bitter Creek, to the extent of their appropriations, regardless of the source of such waters, and that accordingly appellee has no right to divert or use such waters in any manner to interfere with the prior rights of appellants.

It is shown that a part of these waters come from Shoshone Project water which was first applied to land within the Bitter Creek watershed in 1908, and which after being applied to the land, finds its way into Bitter Creek by percolation or through ditches constructed by appellee or by the owners of the land for the avowed purpose of ridding the land of such water. This water, we submit, became a part of the tributary waters of the stream and subject to appropriation therefrom, and that the prior appropriations of appellants gives them a right to said tributary waters superior to the rights of appellee.

The appellee argued that the appellee by virtue of its appropriation under the laws of Wyoming has the right to "consume" in the process of beneficial

irrigation, the entire amount of water brought through the Garland Canal to the Bitter Creek watershed. We contend that any particular portion of this water is "consumed," within the meaning of the irrigation law, when such portion of water is applied to a particular tract of land to irrigate the same pursuant to the purpose for which it was appropriated, and that the right of the appropriator in such particular water is thereupon exhausted.

It is a well established rule of law that when water has been appropriated to be used for mining or power purposes, which purposes contemplate that after the water has been used, a portion of it will find its way back into the stream, the appropriator is limited to the use for which the water was thus appropriated, and can not, as against a subsequent appropriator of the water after it had again reached a natural stream, make a different or additional use of the water which will diminish the quantity to return to the stream and become available to the subsequent purchaser. This rule has been laid down as follows:

> "After the rights of an appropriator have once vested and the amount of water to which he is entitled has once been determined, there is one general rule relative to the change from one use to another which must be observed, and that is he can not change to any use so as to enlarge the quantity of water to a greater amount than that to which he was entitled under the old use if others are materially injured thereby. For this purpose the uses of water acquired by an appropriation may be divided into two classes — those which practically consume none of the water and those which practically consume all of the water. Of course these are the extreme cases, and there are all degrees between; but the extent of the

appropriator's claim is limited to the needs of the purpose for which he makes the appropriation. And if the original purpose is for the generation of electrical power, which comes under the first class above named, and consumes none of the water, it is obvious that he can not change his use to that of irrigation, which comes under the second class, and which would consume all of the water, where the rights of subsequent appropriators have vested, and which rights would be injured by the change. Hence it follows that for the new use he can only consume an amount of the water equal to the amount consumed under the old use or a less amount. * * * Where, however, all of the water is practically consumed by its use for irrigation, its use may be changed to that of furnishing water to a city for domestic purposes. A change from one agricultural use to another is also permitted, as is the case where the water is stored during the period when an appropriator is entitled to its use for irrigation, and used by him to mature crops requiring a later irrigation. *But this cannot be done to the injury of the rights of those who have subsequently appropriated the water for immediate irrigation.* But a change even from one agricultural use to another is not permitted where the appropriator uses more water for the second use than he was entitled to under the first use. However, any change from any use to any other use may be made, provided that the change does not injure the rights of others entitled to the water. *But a change cannot be made in the use of the water which results in an alteration of the point where the water was returned to the stream under the old use.* As between appropriators, it is obvious that one cannot under the law change his use of the water so that he may acquire a larger quantity as against one prior in time to him if his rights are injured. But also the rights of subsequent appropriators

must not in the same manner be injured by one who is prior to them. If the prior appropriator's right to the water was for irrigation or for some other use which practically consumes all of the water, by his valid appropriation, distinct notice is given to all that not only is so much water withdrawn from the public supply, but that its appropriation is such that it cannot be appropriated a second time or any rights gained therein by later comers. But on the other hand, if the water of the first appropriator is for running a mill or for some use which does not consume the water, the same notice is given to all by this use, that the same water may be again appropriated either for other mills, or it may be appropriated lower down the stream for irrigation or for some other beneficial use of purpose. *And after this notice has been given of the extent of the water consumed by the prior appropriator, he cannot change his use after the rights of the subsequent appropriators have vested* to irrigation or to some other use which will consume all of the water."

2 Kinney on Irrigation, 2nd Ed., p. 1530-32.

"A subsequent appropriator has a vested right, as against those prior in time to him, to insist upon the continuance of the conditions that existed at the time he made the appropriation; and if a change in these conditions is made by the prior appropriator, which interferes with the flow of the water to the material injury of his rights, he may justly complain. As was said in a Colorado decision, 'When a subsequent appropriator makes his diversion, he acts under the belief that the water appropriated by his senior will continue to be used as it was at the time of the making of the appropriation of the junior. So, a subsequent appropriator has a vested right as against his senior to insist upon the continuance of the

conditions that existed at the time he made his appropriation.' "

2 Kinney on Irrigation, 2nd. Ed., p. 1404.

A logical development of this rule will establish the proposition that where water has been appropriated for the purpose of irrigating land, and pursuant to such appropriation has been applied to a particular tract of land, the right acquired by virtue of that appropriation is exhausted, and the water must be permitted to follow its natural course into the natural stream which drains the watershed in which it has been applied. While in the discussion quoted above, irrigation is mentioned as a use which consumes all of the water, nevertheless experience in irrigation has demonstrated that in most instances when water is applied to land within the watershed of a stream, a certain definite portion of such water finds its way by percolation or otherwise into the stream which drains such watershed, just as surely as does water which has been used for power purposes, and there is no reason why the rule above stated should not apply as well to an appropriation of water to be used for irrigation purposes as to an appropriation for power purposes. The evidence in the present case shows conclusively that a large portion of the water applied to the land finds its way into Bitter Creek; indeed the appellee contends that the entire flow in the creek is from such source. It follows as the result of such a rule that after an appropriator of water for irrigation purposes has applied such water to the land, such water becomes subject to the law governing percolating water, and the appropriator can not intercept the same before it reaches the stream nor collect it and use it a second time by virtue of the original appropriation. The

above stated rule has particular force in this state where by statute water appropriated for irrigation purposes is made appurtenant to the land for which it was appropriated.

This application of the rule has been made in the case of United States v. Union Gap Irrigation Company, 209 Fed. 274, where the court says:

> "The right of the defendant to acquire water rights from other parties, and to change the point of diversion, is recognized by the common law and by statute in this state, but the right is subject to the important qualification that the change of use or of the point of diversion must not be permitted to injuriously affect rights which have been lawfully acquired subsequent to the appropriation. That the change of the point of diversion in this case to the full extent claimed will injuriously affect the rights of the plaintiff does not, in, my opinion, admit of doubt or question. For a period of about 20 years prior to its acquisition by the defendant the Ellison water right was used on a tract of from 20 to 30 acres of gravelly land on or near the west bank of the Yakima river, in Kittitas county. The land was irrigated by flooding, and could be irrigated in no other practical way. The entire 500 inches was thus used three or four times each season for a period of perhaps a week each time, or not exceeding 30 days in all. The remainder of the time the water was permitted to flow down the canal of the West Side Irrigation Company, and was subject to use by the company or its patrons. The Taylor water right was used on similar land, and in the same way, but the quantity used was less and the period of use longer, perhaps continuously throughout the irrigation season. That a large percentage of the water thus used found its way back into the river, and was subject to diversion and appro-

priation by others is self-evident. What portion found its way back, or what portion will find its way back from the present place of use, cannot be foretold with any degree of certainty, but it can safely be said that a much greater percentage of this 700 inches of water found its way back into the river from the present place of use, and this alone is fatal to the right to change the place of diversion against the protest of other parties who have acquired rights in the stream."

Also in the case of Southern California Investment Co. v. Wilshire, 144 Cal. 68, 77 Pac. 727, where defendant, who was a prior appropriator of water for irrigation purposes, attempted to sell his water right to a city which proposed to conduct it out of the watershed, the supreme court of California held that

"Notwithstanding the diversion of all the water of the creek by defendant at his point of diversion and its use upon his land for irrigation, a certain percentage thereof seeped into the soil and percolated through the same until it reached the stream, and that portion of the water thus seeping into the soil reached the point of diversion of the plaintiff. From the nature of the soil and the heavy grade of the lands it is manifest that this would be the case. The plaintiff has riparian rights in the stream, and this extends to all of the water flowing in the stream through his land, including that which defendants allowed to escape and which seeped into the stream *after being used for irrigation* as well as that which flows in the stream in excess of the increase thus received. As such riparian owner it has a right to have the stream continue to flow through its land in the accustomed manner and to use the same to irrigate an additional area thereof, undiminished by any additional or more injurious use or diversion of the water upon the stream above."

In the present case appellee is not even seeking to reclaim this percolating water upon its own land. It has sold the water to owners of the various homesteads in the Bitter Creek watershed and these purchasers have themselves applied the water to their land for the purpose of irrigating the same, after which a portion thereof has found its way into Bitter Creek, and appellee is nevertheless asserting that by reason of its original appropriation, it still retains the right to collect out of Bitter Creek and again use, a portion of this water which it has sold, notwithwtanding the fact that appellants have, by a vaild permit granted by the State of Wyoming, acquired a right to the use of the water.

G. Rights in Seepage Water.

It must be borne in mind that, as already pointed out, this water to which appellee claims the right as waste and seepage water, is water which has already been once used for irrigation purposes, and is not water which has escaped from appellee's canals. We concede that one who has appropriated or attempted to appropriate seepage water, either before or after it has reached a natural water course, has acquired no right to insist that the conditions which give rise to such seepage shall continue, and we concede that as a result of this rule appellants could not insist upon a continued application by appellee of waters to the irrigation of lands within the Bitter Creek watershed. We concede further that a person who has appropriated water for irrigation purposes has a right to resort to all remedies necessary to conserve and prevent an escape of such water prior to the time it is devoted to the purpose for which it was appropriated. It results

from this rule that an appropriator may, by ditches or otherwise, collect any water which by seepage has escaped from his ditch or reservoir, but a distinction must be made between the exercise of such a right and an attempt to collect seepage water resulting from the irrigation of land after the rights growing out of the original appropriation have been exhausted by a use of the water for the purposes for which it was appropriated. All but one of the cases cited by appellee in its brief in the Circuit Court of Appeals merely lay down the rule which we have thus conceded, and can not be considered as authority against our contention. The case of Lambeye vs. Garcia, 18 Ariz., 178, 157 Pac. 977, is the only case cited by appellee in which an appropriator of water was making an effort to re-collect it after it had been used upon land and to make a second application of it upon other land. In that case the court laid down the rule that one who had sought to make use of such water after its application to the land and before it reached a natural stream, had acquired no vested right therein, since under the statutes of Arizona seepage water was not subject to appropriation until it had reached the natural water course. The court therefore refused to enjoin the original appropriator, at the instance of such a person, from making a new use of the water; but the point which we are here contending for was not raised in that case, and the court based its decision upon the weakness of plaintiff's case and without any consideration as to the rights of the defendant in the water. In that case no intervening rights had been acquired by a valid appropriation as there have been in this case. In this case defendants have not sought to collect and appropriate the water before it reaches a natural stream, but they have made a valid and

prior appropriation from the stream as augumented by these tributary waters.

Appellee cited, quoted from and apparently placed great reliance on the case of Ramshorn Ditch Co. v. United States, 269 Fed. 80, and Judge Carland, (Page 404) without making any analysis of the case, cites it as establishing the proposition that appellee may continue to use the drainage, waste and seepage waters as it now proposes to do. An examination of that case will disclose that it merely establishes the rules above conceded and does not pass upon a state of facts similar to the ones here involved, nor decide the question here at issue. The water involved in that case was not water which had been collected after having once been used for irrigation, but was water which had by seepage escaped from the main supply canal of the United States Reclamation Project, and which, under the rule we have conceded, was subject to recapture by the owners of that canal. It is stated in the opinion in that case:

> "Certainly the appropriator must have a reasonable time in which to save and use water that by seepage and waste has escaped from his canal or ditch. We are therefore of the opinion that, as against the ditch company, appellee had the right to recapture the seepage water which had, it is admitted, come from the Interstate Canal."

Moreover the opinion of the trial judge is referred to for a statement of the facts, and in that statement (254 Fed. 842) it is shown (Page 843, 845) that the water in controversy, as it appeared in the previously dry draw, resulted from the fact that the main supply canal of the project looped for a distance of about

twenty miles around the head of the draw and (Page 845) that while thirty-five to eighty second feet of water develops in the draw, the loss from the main canal by seepage during those twenty miles was from thirty-eight to forty second feet and from the laterals was about forty second feet, the trial judge stating that "In addition, the amount of seepage was increased by irrigation, but there was no testimony from which that can be approximately estimated." That the water arising from this latter source of supply was not considered in the decision is shown by the opinion of the trial judge (Page 850, 851) in which it is stated

> 'Counsel for the Ramshorn Company devote a large part of their brief and argument in support of the proposition that seepage water is a part of the natural stream which it would, in natural course, finally reach and add to the stream flow; and cites among other cases * * * The proposition is relied upon in refutation of the plaintiff's claim that the right to collect and use these waters belongs to it because they are flood waters and were brought in by it through its course, that before it brought them in the seepage water here in controversy did not exist, and that by virtue of these facts the water should be considered as developed or new water, to which plaintiff should be given the first right until the seepage in fact reaches the river flow. The rule for which counsel contend is undoubtedly established beyond controversy by the authorities they cite, on the state of facts developed in those cases. The facts in each of those citations were alike. The question presented to the courts was; whether or not leakage, seepage, waste, return and percolating waters could be collected and then diverted and used for irrigation so as to decrease the natural flow of the stream to the detriment

of prior appropriators below, whose appropriations had been fed by the underground waters before they were diverted. *The specific question here involved, Has the canal owner the right to collect and use on his original appropriation waters which leak from his canal and laterals? was not up.*"

It is thus apparent that the Ramshorn case only reiterates the conceded rules and does not at all establish the proposition in support of which it was cited by Judge Carland (Page 404).

Of the other cases cited in the same connection, McKelvey v. North Sterling Irrigation Dist. 179 Pac. 872, and Hagerman Irrigation Co. v. East Grand Plains Drainage Dist. 187 Pac. 555, merely hold the conceded rules, Lambeye v. Garcia has already been discussed, and Griffiiths v. Cole, 264 Fed. 369, and United States v. Haga, 276 Fed. 41, are decisions by District Judge Dietrich, who cites the Ramshorn McKelvey and Hagerman Irrigation Company cases above mentioned, in support of his decision, and whose decision is entitled to no more weight than that of Judge Riner which is here appealed from.

H. Rights in Percolating Waters.

After the purchase by the homesteaders of any particular portion of the water appropriated by appellee through this project, and the application of such water by the homesteaders to the irrigation of their lands, so much of such water as is not used and consumed by the crops growing upon said lands, becomes percolating water and subject to the laws relating to waters of that character.

Under the theory of the common law, percolating water has no ascertainable source and no ascertainable

destination, and therefore is treated as being a part of the land in which it is found, and subject to any use which the owner of said land may be able to make of it. The modern authorities, however, particularly in the western states where irrigation is practiced, have tended to make a distinction in favor of such percolating waters as do have an ascertainable destination, and to treat such waters as being tributary to the stream into which it is ascertained they ultimately find their way. Such waters are, therefore, subject to the same rules of law as are applicable to any other waters tributary to the stream, and as against one who has appropriated the waters of the stream as augumented by such percolating water, the land owner can use them only so long as they are used upon and for the benefit of the land in which they are found, and any person other than the owner of such land can acquire rights in such water only through a regular and valid appropriation of the waters of the stream. Kinney has laid down the rule in reference to such waters as follows:

> "Strictly speaking water while it is still percolating through the ground can not be itself classified, but all comes within the definition given in the last section. It is only during recent years that an attempt has been made to classify percolating waters. This classification is made not from any distinction which may be made in the water itself or in its percolations through the ground, but with reference to the streams or other bodies of water of which the percolating waters are tributary. The courts, especially some of those within the arid region of this country, led by those of California, have decided that certain percolating waters which supplied streams or other bodies of water had such a status that

rights may be acquired therein where rights had already been acquired to the waters of the streams or other bodies. This is upon the principle that the percolating waters are tributary to those waters, and the owners of rights to waters of streams are also the owners of rights to the waters of their tributary so far as are necessary to supply their needs within their respective rights. We will, therefore, adopt a classification of percolating waters, with reference to the bodies of water of which the percolating waters are tributary, if they are so tributary; if they are not tribuatry to other bodies of water, they will be classified as diffused percolations. This classification, then, is as follows: First, diffused percolations; second, percolating waters tributary to surface water courses or other bodies of surface waters; third, percolating waters tributary to underground reservoirs or other bodies of underground waters; fourth, seepage waters."

2 Kinney on Irrigation, P. 2151.

"Our second class of percolating waters we will define as those waters which infiltrate their way through the adjoining ground to some surface water course or other body of surface water. These waters differ from the underflow of surface streams in the fact that they have not yet reached the channels of the water courses to which they are tributary; while, upon the other hand, the underflow of surface streams have reached these channels and are therefore dealt with as component parts of such streams. These waters are those which come from rain or the melting of snows within the watershed of any stream or other body, and sinking below the surface for the time being again reappear when the channel is reached and swell the flow of such surface streams or other bodies. They are therefore properly treated as tributary to those streams. They also

differ from diffused percolations, treated in the previous sections of this chapter, which are mere vagrant drops moving in any and every direction and which, as far as known, are not tributary to any stream, nor swell the volume of water flowing therein. The distinction between diffused percolations and percolating waters supplying the flow of a stream is correctly drawn in a recent case decided by the Supreme Court of California, wherein it was held that the waters of the San Fernando Valley were not 'percolating' waters in the common law sense of the term 'vagrant wandering drops moving by gravity in any and all directions'; that these waters percolate, it is true, but only in the sense that they form a vast mass of water, always moving downward to the outlet, which was the Los Angeles River.

"It was not until the case of Katz v. Walkinshaw was decided that the courts classified these waters as a distinct class of percolating waters, although their existence had been recognized by much earlier decisions. They were regarded as to precarious in their movements to be considered as anything but a part of the soil itself and accordingly they were so treated. In the early cases it was considered that a stream took its source only in the water that could be seen with the eye issuing from the surface of the ground, from a spring, or otherwise; and that, too, without regard to the source of supply of the spring, or the water percolating from the sides into the water course. But the case of Katz v. Walkinshaw was decidedly revolutionary in character, and not only gave these waters, which slowly percolate into and feed the surface water courses a distinct classification, but also decided that certain rights could be acquired in them as tributaries to the surface water course. This decision grew out of the very necessities of the conditions in the arid region of this country, and all common law distinctions were expressly repudiated."

"It was not until the more recent scientific investigations, before mentioned, as to the movements of underground waters through the soil, that these percolating waters tributary to surface waters were recognized as belonging to any particular class, or that any rights could be acquired in them other than the rights which could be acquired to the soil itself, through which they found their way, of which soil, under the prevailing common law rule, they were considered component parts. But, by these geological and topographical investigations made by the Government and others, it has been proven in many instances that waters percolating through the soil of watersheds were not only the sources of supply, but the only source of supply of certain streams and other surface bodies of water. It being proven absolutely that these percolating waters physically are directly tributary to these streams, the law has kept pace with these scientific investigations proving this fact; and, therefore, it follows that in law they should be, and in many jurisdictions are, dealt with and treated as tributary waters. And, where rights to the waters of the stream itself have been once acquired, by appropriation or otherwise, it is unlawful for persons owning land bordering on the stream to intercept the waters percolating through them on their way to the stream, and apply it to any use other than its reasonable use upon the land upon which it is taken, if he thereby diminishes the flow of the stream to the damage of those having rights therein. Therefore, this rule modifies the common law rule that the owner of the land is also the owner of all the water found percolating as a part of the soil itself, and that he may use and dispose of it as he sees fit, to the extent that he may use only these waters so percolating through his land, subject: First, to the rights of others to the water flowing in the stream which this water

augments, upon the same principle as though this water was a part of the stream itself, as, for example, its underflow; and, second, the reasonable use of the water so percolating through his land, limited only by the operation of the maxim, 'Sic utere tuo alienum non laedas,' for the reason that, as held by a very recent California case, all who have access to these waters, by virtue of their natural situation and ownership of the lands through which these waters find their way, 'have a common right, and of which they may each make a reasonable use upon the land so situated. * * * The natural rights of these defendants and the plaintiff in this common supply of water would therefore be coequal, except as to quantity, and correlative.' "

2 Kinney on Irrigation, 2nd Ed., pp. 2162-2165.

In Comstock v. Ramsay, 55 Colo. 244, 133 Pac. 1107, which was a controversy involving the right of the owner of land to collect in a ditch seepage waters accumulating in such land as the result of irrigation, and to sell the waters so collected to be used upon other land, the supreme court of Colorado held as follows:

"It is apparent from the foregoing quoted finding and the oral statement of the trial judge as set out above, that the conclusions of the court were based upon the fact that the seepage waters under consideration were in a sense artificial and not natural waters of the stream; that they had been brought from the river to their present position through artificial means after once having been used by bona fide appropriators from the river, and that therefore they were not subject to the rights of other appropriators down the stream and were not, in fact, a part of the

river for the purpose of supplying appropriations therefrom; that is, were not the natural waters of the stream and could not be called upon by decreed appropriators and users of water further down the stream to supply their priorities. It appears from the statements of the trial judge that these waters had either already done so or would at least eventually return to and become a part of the river, but it was held that until they had actually mingled with the waters of the stream they were subject to independent appropriation. The fact that this drainage ditch did not directly tap the river itself and withdraw water from it or from the water table thereof, but only intercepted water in its course to the river seems to have been decisive with the trial court, that there was no interference with the river flow. * * *

"There is no law anywhere to support the contention that if these waters are naturally tributary to the river, still they may be taken by a new claimant to the damage and injury of prior appropriators upon that stream, simply because he captures and diverts them before they actually get into the river channel. If such act of capture and diversion can be upheld as lawful and proper, by the same reasoning a new claimant could divert the waters of a surface tributary, if he could only be spry enough to capture and divert them before they actually reach and mingle with the waters of the main stream. When it is shown or admitted that these waters ultimately return to the river and thereby augment and replenish its flow, they are part and parcel thereof, whether the limit within which this occurs be short or long. *The moment they are released by a user under an appropriation from the river, which has been duly decreed, and start back in their course to the stream, they become and are as much a part thereof as when they actually reach the stream.*

Whenever these waters start to flow back to the river and it is apparent they will reach it, they constitute a part of the stream and are not subject to independent appropriation as a new or added water, or because they have been used to serve one priority and have been thus artificially brought into that position. It is asserted by the defendant in error that at the time of the construction of the seepage ditch the water sought to be thereby appropriated had not become tributary to the river, in the sense that it had not actually reached the river channel. The fact that it might ultimately do so is declared by him to be immaterial. This contention we cannot approve, but as already indicated, we are rather of opinion that when such waters leave the control of the original appropriator, having been used either for direct irrigation or reservoir purposes, without intention of recapture or further use, by him, they immediately become a component part of the river, and cannot be lawfully diverted from their course to it by independent appropriation, to the injury of those having decreed priorities therefrom.

"We do not hold that there can be no inde pendent appropriation of seepage, return and spring waters; but on the contrary, where such appropriation does not interfere with a prior right, that it may be done upon facts and conditions which warrant it. What and all we do intend to here determine, on this particular point, s that where it appears that such waters are in fact tributary to the stream and form a substantial and material source of its supply, upon which appropriators therefrom have depended for water to satisfy their priorities, that then, as between such bona fide appropriators and users of such waters and a new claimant, the former has the first and better right."

This opinion is quoted and approved in the case of United States v. Rams Horn Ditch Co., supra. In the very recent decision of this court in the case of Snake Creek Mining Co. v. Midway Irrigation Company 67 L. Ed. (Advance sheet) p. 237, the court recognized this rule as prevailing in states such as Wyoming where the doctrine of prior appropriation obtains.

Appellee is not the owner of the lands through which these waters percolate, and makes no pretense of using them upon such land, but is attempting, by collecting them in canals and drainage ditches, to transport them to and apply them upon other lands within the project. As has already been pointed out, these waters have been sold by appellee to the owners of the land through which they percolate, and have been applied upon such land not by appellee, but by such land owners. Appellee has not acquired by appropriation any right to the waters of Bitter Creek nor to the waters tributary to that stream, and we submit that appellee, in collecting these percolating waters and diverting them from Bitter Creek and thereby depriving the appropriators from Bitter Creek of the benefit of them, is violating the rules of law laid down above relative to percolating waters tributary to a water course. The entire evidence in this case shows beyond controversy that this percolating and seepage water all finds its way into Bitter Creek, and therefore that it fails well within the above definition of percolating waters tributary to a water course.

I. Abandonment of Appropriated Water.

Aside from the proposition which we have laid down in the preceding subdivisions, to the effect that

the rights of an appropriator of water for irrigation purposes are exhausted as soon as such appropriator has applied such water to the irrigation of a particular tract of land, there is another reason why appellee must be held to have lost its right to reclaim such water or to intercept its return to Bitter Creek, and this reason is that appellee at the time it first applied water to the irrigation of land within the Bitter Creek watershed, abandoned all right to make a further use of such water. As stated in Kinney on Irrigation, Vol. 2, page 2005, a distinction must be made between the abandonment of a water right, or in other words of a right to appropriate water, and the abandonment of the water itself, and while a mere non-user of a water right does not ordinarily indicate or result in an abandonment of such right, the courts have uniformly held that where the water itself is discharged and released by an appropriator without any manifested intention of reclaiming it, such water is abandoned and becomes subject to a new appropriation as soon as it reaches a water course. The cases cited, by appellee in its brief in the Circuit Court of Appeals, on the question of abandonment, all relate to the question of the abandonment of water which is involved in this case. There need not be an expressed intention to abandon at the time the water is released, but on the contrary, the release of the water constitutes an abandonment unless at the time there is disclosed an intention not to abandon. In the case at bar the evidence shows that water from the Shoshoni Project was first applied to land within the Bitter Creek watershed for the purpose of irrigation in 1908; that at that time appellee manifested no intention to make any further use of such water, but permitted it to percolate through the soil of the watershed until it

reached and augmented the flow of Bitter Creek, and, as it accumulated in greater quantities, constructed artificial drains for the purpose of accelerating its flow into Bitter Creek and ridding the land of it, and again without any manifested intention to make any further use of the water. George O. Sanford, the engineer in charge of the project and one of the chief witnesses for appellee in his deposition testified (Page 167) that prior to 1910 the necessity of constructing a drainage system was not given much consideration, and (Page 170) that surveys and investigation was not started until 1912, and (Page 187) that the project of utilization of waste water was first given rather definite consideration in 1915. On page 181 he testified that the project officers put upon the land owners to whom they had sold the water, the obligation of getting rid of surplus water from their land. On page 179 he testified that the only publication of any claim on the part of appellee to the use of such waters was in the official reports, the first of which was published in 1910. As appears on pages 168 and 169, this alleged claim was merely the general statement that "the United States claims all waste, seepage and percolating water arising in the project and proposes to use such water in connection therewith." He further testified (Page 179) that no local publication of such a claim was made, and that no notice or intimation thereof was given to the appropriators of water from Bitter Creek until this controversy arose. We submit that these general statements of plans, made in the reports of the managers of the project to the department heads, and not intended nor operating as notice to the public, do not constitute notice, and certainly not sufficient notice, of an intention to recapture particular seepage water. Moreover, despite this alleged notice,

appellee did not make any attempt to carry out its alleged intention, by recapturing or attempting to recapture this particular water, for a number of years after such publication, and not until after rights had been secured by appellants through appropriation permits from the State of Wyoming, in the waters of Bitter Creek as augmented by this abandoned water.

While it is true, as held by numerous authorities, that an appropriator of water for irrigation or other purposes may utilize a natural water course as a conduit for such water, without thereby losing its right to such water and a right to again withdraw it from the stream at a lower point, these authorities lay down the rule with the modification that at the time the water is turned into a natural water course there must be a manifested intention on the part of the appropriator to again withdraw it from the stream, and that in the absence of such intention there is an abandonment of the water. The circumstances of this case fail absolutely to show that at the time these Shoshone waters were first discharged upon the land within the Bitter Creek watershed, there was any intention on the part of appellee to reclaim them after they reached the stream. That there was no such intention at that time, and that as late as December 20, 1910, appellee considered that it did not own the waters of Bitter Creek, but that the same were subject to appropriation in conformity with the laws of the State of Wyoming, is indicated by the fact that on that date appellee, through the officers in charge of the project, made formal application to the State Engineer for a permit to appropriate such waters (Pages 254-257). This application is the notice referred to by appellee in its pleadings as constituting notice to the state that it claimed the water, but

instead of being a notice to that effect it was rather a recognition and notice of the fact that it then had and claimed no such right but was seeking to acquire one.

The rules regarding the abandonment of water as distinguished from the abandonment of water rights, as above laid down, are amply supported by the following authorities:

> "While the appropriator of water may turn it into a ravine or gulch, or may even turn it back into its original channel for the purpose of conveying it to the place where it is to be used, nevertheless 'In order to take advantage of the right to use the channel of the stream for a part of a ditch, there must be an intention to recapture it, otherwise the water belongs to the other appropriators on the stream, according to their priority of rights, the water being treated as abandoned by the one who turned it into the stream.' "
>
> 2 Kinney on Irrigation, 2nd Ed., p. 1459.

> "Assuming that a certain amount of water is added to the natural flow of a stream by artificial means, the right to recapture the same at a point lower down depends largely upon two facts: First, the right to the water as acquired by the appropriation of the same in the first instance, and second, at the time the water is discharged into the stream, there must be clearly evidenced the intent to recapture it. As to the second proposition stated above, the clear intent to recapture must be present at the time the water is turned into the stream. For without this intent to recapture, the increase due to the artificial discharge into the stream will be treated as abandoned by the one discharging the same, and will go to those appropriators of the stream, in

the order of their priorities, as is the case of any natural increase in the flow of the waters of the stream. * * * And hence it follows that where water is discharged into a natural stream, there must at that time be an intention on the part of the owner to reclaim it, otherwise it becomes a part of the volume of the stream and inures to the benfit of the appropriators of its waters, in the order of their respective appropriations, and the original owner will be held to have abandoned all further rights to the use of such water."

2 Kinney on Irrigation, 2nd Ed., p. 1391.

"A distinction must be made between the abandonment of a water right and the abandonment of the water itself. Water, after it has been used for the purpose for which it was appropriated, may be allowed to escape from under the control of the appropriator, without any intent on his part to recapture it. In the first instance it is the abandonment of real property, and in the other it is the abandonment of personal property. Again, water developed incidental to some other enterprise, such as mining, while ordinarily it belongs to the party developing the same, may also be discharged without any use having been made by him of it, and this is, in effect, an abandonment of water and not a water right."

2 Kinney on Irrigation, 2nd Ed., p. 2005.

"Where, after use by a prior appropriator, water is discharged into a stream for the purpose of drainage or as a convenient method of disposing of it, and without any intent on the part of the owner of the right to reserve or recapture it, it works an abandonment of such water, and the water thus discharged becomes a part of the natural stream, and is subject to reappropriation

and to the same rights as the water naturally flowing therein, and cannot afterwards be taken out by the original appropriator to the injury of other rights which have attached and vested to it."

2 Kinney on Irrigation, 2nd Ed., p. 2006.

"The effect of the abandonment of water rights, water itself, ditches, etc., depends largely upon the nature of the right abandoned. In the case of the abandonment of water rights, and water discharged into a natural stream for the purpose of drainage, or as a matter of convenience, without any intent to recapture it, the effect is the same. First the former appropriator or owner, loses absolutely all title to the water right, or the portion thereof abandoned, and all right to the use of the water so discharged into a natural stream, and second, the water formerly claimed under the right becomes a part of the volume of the stream and publici juris, and therefore subject to the appropriation of the first comers; or, if there are already subsequent appropriators upon the stream, the water inures to the benefit of such subsequent appropriators, to be enjoyed by them in the order of their respective priorities."

2 Kinney on Irrigation, 2nd Ed., p. 2016.

"Water is abandoned when it is returned into its natural channel with no intention of recapturing it, but there is no abandonment of water which is turned into a stream merely for the purpose of conducting it to another point where it is intended to use it, nor does the use of a dry ravine to conduct the water a part of the way to a dam constitute an abandonment."

40 Cyc. 726.

"Where a person develops a supply of water so as to increase the flow of a stream, such increase belongs to him, and he may divert an equal quantity of water from the stream, but if the additional water belongs to no one, or is abandoned by its owner, it goes to the benefit of the several appropriators of the stream in their order."

40 Cyc. 717.

"After seepage or waste waters reach the stream, unless there is then an intention by the owner to reclaim them, they become part of its volume, and inure to the benefit of the appropriators of its waters, to be enjoyed in accordance with their numerical priorities. That this is the law when waste water is turned into a natural stream, with no intent of the owner to reclaim it, has been expressly decided. There is no difference in principle between waste water thus added to a natural stream and water which, by natural law, so finds its way into such channel by percolation, surface or subterranean flow."

La Jara Creamery Association v. Hansen, 35 Colo. 105, 83. Pac. 644.

"Plaintiffs had prior occupancy of the waters of Shady Creek, by means of a dam and a ditch constructed by them. Defendants, by like means, obtained the use of other neighboring streams, and after using the water thereof, it flowed by natural channels into Shady Creek above plaintiff's dam. Defendants then built a dam above plaintiff's dam on Shady Creek and withdrew a portion thereof from plaintiff's works. Defendants made the point that since it was by their act that the waters of Grizzly Canon and Bloody Run were caused to flow into Shady Creek, they had a right to construct a dam and ditch above plain-

tiff's and carry off the same quantity of water from Shady Creek that flowed from defendants' ditch at Cherokee Corral. HELD: "When the water of Grizzly Canon and Bloody Run left the possession of defendants at Cherokee Corral, all right to and interest in that water was lost to defendants. It might be made the property of any person who chose to possess it. Without the agency it found its way into Shady Creek, joining the waters then in the possession of plaintiffs, and became a part of the body of water used and possessed by them."

Eddy v. Simpson, 3 Cal. 249.

"Water discharged from an artificial into a natural channel, as a matter of convenience, and without any intention to reclaim it, is abandoned, and becomes a part of the natural stream, and subject to the same rights as water naturally flowing therein."

Schultz v. Sweeny, 19 Nev. 359, 3 A. S. R. 888.

"The authorities upon the subject hold that if several parties have acquired successive rights to the use of the waters of a certain stream and the volume of the flow is afterwards increased from natural causes, the increased flow belongs to the several appropriators respectively, according to their priority of right, and within the limits of their respective rights. That is to say, if the first appropriator is fully supplied at all times when he needs the water to the full extent of his appropriation, he can take none of the increase. If the next subsequent to him is also fully supplied, the same result follows and so on, until the right reaches a subsequent appropriator who is at times short of obtaining the full amount to the extent of his claim. This one may take from the increase flow sufficient water up to the full quantity

lawfully claimed by him, and the surplus if any, of the increased flow, passes on to the next subsequent appropriator and so on. The same rule also applies where the increase in the flow of a stream is due to artificial means, as where water from an artificial source is turned into the stream without any intention of recapturing it, also to waste water which seeps or finds its way on the surface to augment the flow of the stream. There is no difference in principle between waste water thus added to a stream and water which by natural law, so finds its way into such channel by percolation, surface, or subterranean flow."

2 Kinney on Irrigation, 2nd Ed., p. 1389.

"Seepage waters are to be considered a part of the stream from the moment they are re eased by a user, under and appropriation from it, and they must be permitted to return to the stream, for the benefit of other appropriators therefrom, in the order of their priorities."

Durkee Ditch Co. v. Means, (Colo.) 164 Pac. 503.

Judge Carland (Page 405) states that abandonment was not pleaded by appellants. He is certainly mistaken as to that. Not only are the facts alleged which raise the conclusion of abandonment, but there is the express allegation of abandonment in the answer of each appellant who owned any part of the school section. These allegations are found on pages 14, 63, 68, 74 and 79.

J. Good Faith of Appellants.

Appellee, in argument, and Judge Carland in his opinion (Page 401) slightingly and somewhat sneeringly refer to appellants as attempting "to make worthless

lands worth $250.00 per acre at the expense of the plaintiff" and as being willing to receive this benefit without contributing anything therefor; and it is apparent all through his opinion that Judge Carland entertained and presumably was, to some extent at least, actuated by this view. There was no evidence from which it could fairly be inferred that appellees were open to such accusations. Although not a matter of record, it is a fact that appellants, in purchasing the from the state, were charged and paid an additional amount of $14.00 per acre because of the belief, on the part of the state officials and of appellants, that the land was irrigable under permits to be granted by the state. It is of record that the appellants, pursuant to the permits obtained from the state, constructed at their own expense irrigation works which were presumably as expensive in proportion as those of appellee. The water here in controversy was originally the property of the state and was given by the state to appellee without consideration other than the construction of irrigation works which would make possible its application to a beneficial use. It has done that and has already received the benefit of one such application. Appellants have done just as much under their permits and are no more deserving of the comments above referred to than is appellee.

Judge Carland enlarges upon the extensiveness of the operations of appellee and the large sums which it has expended in carrying them on, and intimates that appellants will seriously impede and interfere with these operations, and appellee in argument referred to the school section of appellants as an irrigation project within an irrigation project, and sought to raise the inference which was apparently adopted by Judge Carland, that the larger project

will be seriously hampered if the smaller one is allowed to continue. There is no evidence to support this inference, but on the contrary the evidence all indicates that conservation and an economical use of the water will be best accomplished by upholding the appropriations of appellants.

There is no evidence that the deepening of Bitter Creek is necessary in order to make available to appellee such water of Bitter Creek as is not appropriated by appellants, or that an award to appellants of such water as their appropriations call for will result in any greater waste of the remaining water of the creek. On the contrary, Sanford, the engineer in charge of the project, testified (Page 178) that appellee intends merely to use the water in Bitter Creek for peak requirements, and it is a reasonable deduction from that testimony that at other times this water, including that which appellants will utilize if not interfered with by appellees, will be permited to run and waste.

K. Conclusion.

We submit in conclusion that the reservations in the patents from the United States of the homesteads of appellants Ide and Charles Grant Caldwell, do not authorize the excavations made by appellee on those homesteads; that appellee had no right of way across the school section belonging to appellants, and its attempt to assert such a right was unlawful, since the statute under which such right was claimed applies only to land the title to which remains in the state at the time the statutory steps are taken to exercise such right, and even as to such lands, does not authorize interference with a natural stream and with water rights acquired therein; that appellants, by virtue of

their appropriations are entitled to the natural run-off from Bitter Creek watershed and to that extent at least entitled to the relief granted by the trial court; that in addition to the natural run-off, appellants are entitled, to the extent of their appropriations, to the waste and seepage waters flowing in Bitter Creek for the reason that appellee has, by applying such water to the purpose for which it had been appropriated, exhausted its rights therein, and that such waters thereupon became tributary to Bitter Creek, and for the further reason that even if appellee's rights in the water were not exhausted by such use, they were lost through abandonment. We submit further that appellee, whose status is that of any other individual, and who after attempting in conformity with the laws of the State of Wyoming to secure a share of the waters of Bitter Creek, had been denied by the state authorities a right to any of such water, and who then, in defiance of such order of denial, attempted in this arbitrary manner, merely as an incident to its claimed right of way for a ditch across appellant's land, to appropriate all of the water of Bitter Creek and to destroy all of the water rights regularly obtained by appellants in conformity with the laws of the state, is not entitled to any consideration at the hands of a court of equity.

Respectfully submitted,

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